

The legal ramifications of section 27 (1) (e) of the Motor Vehicle Accident Fund Act No. 10 of 2007. A Constitutional Perspective.

Written by:

Evast Tulonga Ndipwashimwe

(200721275)

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PREPARED UNDER THE SUPERVISION OF

Ms. E. Namwoonde

UNIVERSITY OF NAMIBIA

FACULTY OF LAW

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CHAPTER 1

1.1 BACKGROUND TO THE PROBLEM

Due to colonialism all the laws as applied in South Africa were applied in Namibia therefore meaning all the Motor vehicle insurance legislations which regulated third party compensation in South Africa, were consequently binding on Namibia and regulated the third party compensation in Namibia thereof.

The need to compensate third parties has been felt in the past years in South Africa, as early as 1930 hence the introduction of motor vehicle accident claims (MVA claims) in our law.¹ The *Motor Vehicle Insurance Act*² was promulgated as a result of the need to compensate third parties³ in road accidents and only came into effect in 1946. This Act aimed at compelling owners of motor vehicles, with certain exceptions to take out insurance in order to cover persons suffering damage due to physical injury or death of their bread winners arising from the negligence and unlawful driving of motor vehicles.⁴

The system in South Africa as well as in Namibia was amended and the motor vehicle insurance fund was created which acted as re-insurers of third party insurance policies.⁵ An agreement was later entered into between eleven insurers to acquire the sole right to undertake third party insurance.⁶ The 1942 Act was repeatedly amended and led to the birth of the compulsory *Motor Vehicle Insurance Act 56 of 1972* which was later replaced by the *Motor Accidents Act 86 of 1986*.⁷

¹ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : LexisNexis: Butterworths, p. 3.

² Of 1942.

³ According to Klopper on page 30, a third party is any person who suffers bodily injuries as well as any person who is legally obliged to compensate such person for his/her bodily injuries as a result of the negligent and unlawful driving of a motor vehicle or other unlawful act which can be linked to the driving of a motor vehicle qualifies to be a third party.

⁴ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : LexisNexis: Butterworths, p. 3.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*, p. 4.

With the advent of independence the Namibian legislature promulgated the *Motor Vehicle Accident Fund Act 30 of 1990* which came in operation on the 11th of November 1991. The *MVA Fund Act of 1990* was later replaced by the *MVA Fund Act 4 of 2001* which has also been repealed by the *Motor Vehicle Accident Fund Act 10 of 2007*, which is the Act regulating third party compensation in road accidents matters in Namibia at present. Under this Act the MVA Fund is mandated to: provide assistance to persons injured in motor vehicle accidents and to dependents of the person killed in such accidents and to provide for incidental matters.

The Namibian Motor Vehicle Accident Fund is a creature of statute created in terms of the *MVA Fund Act*⁸ and which is the governing statute at present and which has repealed the earlier MVA legislations. In terms of the current *MVA Fund Act*, the MVA Fund is mandated to compensate motor vehicle accident victims.

Due to the increase in road accidents, many people are left disabled and in constant need of medical care. Spouses lose spousal support as well as maintenance, and many children lose their parental support as a result of motor vehicle accidents. It is for this reason that the MVA Fund was established to compensate all the victims of motor vehicle accidents. The MVA Fund has stepped in the shoes of the drivers who causes accidents and compensates the third parties on the driver's behalf. Fortunately the road accident victims do not have to spend a lot of their own money trying to recover damages or rather compensation from the drivers.

The basis for the MVA compensation is analogous to the Law of Delict which provides that any person who causes harm to another must compensate the victim and the person whose rights are infringed has a corresponding right to claim compensation.⁹ MVA claims arise as a result of third party compensation, which is statutory based, even though there is an element of compensation, the wrong doer's damages are absorbed by the MVA Fund which

⁸ Act No.10 of 2007.

⁹ Neethling J. (2001). *Law of Delict* 3th ed. Durban: Lexis Nexis: Butterworths, p. 3.

act as the insurer while as with delict the victim claims directly from the person who causes the harm.

In other words, the MVA Fund is established to replace the Common Law, to the extent of its compensatory scheme. That is to say, what the MVA Fund does not cover the right of the third party to claim against the actual wrong doer revives.

The principles of delict are also applied to social issues relating to third party compensation (as shall be shown below). When a claimant is seeking to recover any patrimonial loss arising from a motor vehicle accident, such person must prove the following delictual requirements: that there was conduct on the part of the driver, that the conduct was unlawful, that the driver was negligent, that the claimant suffered damages and that there was a causal link between the conduct and the damage sustained.¹⁰

Each Act has its shortcomings and the legislature has always tried to remedy the shortcomings of these Acts by enacting Acts which aim at addressing the issues and subsequently which repealed the previous Acts. The previous Acts did not really contain rigid limitations on the MVA Fund's liability and as a consequence a large sum of money was spent in compensation which led the Fund to be in a very difficult financial position at present.

The current Act's limitations are quite rigid and at all times the Fund tries to use these limitations to its advantage to mitigate its losses, the question one asks is: should the MVA Fund always try to place rigid limitations on benefits even in circumstances where the limitations will negate the mandate and purpose of MVA Fund?

For the past years the Motor Vehicle Accident Fund has been under the mandate to compensate road accident victims and played a minimal role in road safety. As the years went by, there has been a shift from simply compensating road accident victims to stepping up efforts in road safety. It has been realised that the MVA Fund has to actively engage in

¹⁰ Cooper,W.E.(1996).*Delictual Liability In Motor Law*. Cape Town: Juta and Co LTD, p.5.

road safety in order to bring down the number of accidents on our roads and consequently to reduce the amount of money the MVA Fund spent on road accident victims, hence the introduction of section 27(1)(e).¹¹

Road safety encompasses many factors which include the mode of transportation. It goes without saying that a vehicle not designed for the carriage of passengers is not safe for purposes of road safety. Even though section 27(1) (e) has contributed to the reduction of road accidents in one way or the other; it has in some instances acted against passengers who can not afford to buy or travel on properly seat-fitted vehicles.

Previously liability in terms of the MVA Fund legislations was dealt with on the basis of negligence and not on the basis of the kind of vehicle the road accident victim was travelling on. Section 27(1) (e) of the *MVA Fund Act 10 of 2007* has been a departure from the old rules on exclusion and limitations of the MVA Fund's liability. In the previous legislations there were no similar provisions to sec 27(1) (e) of the *MVA Fund Act 10 of 2007*. Even though the main reason behind the introduction of section 27(1) (e) is road safety, the provision has proven to be discriminatory against a certain class of our society.

1.2 STATEMENT OF THE PROBLEM

The MVA Fund has been established to compensate motor vehicle accident victims but despite the efforts and clear mandate of the MVA Fund to compensate the victims, the MVA Fund Act¹² has placed rigid limitations and exclusions on the liability of the MVA Fund when it comes to compensating road vehicle accidents victims and claimants.

Section 27(1) (e)¹³ provides that the benefits of any of the injured person who was being conveyed on a non-properly seat affixed vehicle for the conveyance of passengers will be limited. Giving this section a literal interpretation improperly seat-fitted vehicles would mean

¹¹ Of the *MVA Fund Act* No. 10 of 2007.

¹² *ibid.*

¹³ *ibid.*

Bakkies, Vans, Trucks etc. As a consequence of section 27(1) (e)¹⁴ this exclusion does not only disentitles victims to accidents involving such vehicles from receiving compensation but actually discriminates them from other victims as they cannot receive all the benefits afforded to other victims travelling on properly seat-fitted vehicles.

We are living in a society where vehicles which are not properly fitted with passenger seats are conveying passengers, such as Bakkies, vans, trucks etc, there has never been a law which prevented this practice and for as long as there is no legislation prohibiting vehicles with un-properly seat-fitted from conveying passengers, it is therefore questionable why victims who were travelling in such vehicles cannot be compensated to the same extent as all other road accident victims. Further it is the purpose of this research to establish whether this does not create an inequality of treatment between passengers in properly seat-fitted vehicles and those in properly seat unfitted vehicles and whether such inequality does not render Sec27(1)(e) unconstitutional.

With this scenario, it juxtaposed the situational effects in which the users of vehicles not designed for the purpose of conveying passengers find themselves in. In very many qualified instances the only mode of transport available is the one not in conformity with what the Act seeks to achieve or prescribes, to realise road safety. In any places of rural Namibia, bakkies are at the centre of transportation business, either because the road infrastructure does not permit any other vehicles to be used for this purpose or nobody runs such a business with a fleet of appropriate vehicles or consequently as a result of a combination of the same factors.

Section 24(1)¹⁵ provides for the liability of the Fund, to render assistance as well as to compensate road accident victims provided the accident occurred as a result of the negligent or unlawful driving by the driver of a motor vehicle. The section provides further that the liability of the Fund is dependent on the exclusions and limitations imposed in the

¹⁴ *Of the MVA Fund Act 10 of 2007.*

¹⁵ *ibid.*

Act; consequently all victims falling under the provisions of sections 26 and 27 can not be compensated or fully compensated for by the Fund.

The MVA Fund is also mandated in terms of its legislation, to respond to road vehicle accidents. In terms of Section 23(1) (c),¹⁶ before the Fund determines liability as provided in the Act, it is the MVA Fund's duty to ensure that all road accident victims in critical conditions are attended to in terms of medical care and investigations can only commence once the victim is in a stable condition, hence the use of the term stabilization in the Act. The concept stabilisation has been a difficult one to define; it has been afforded various definitions by different persons. Stabilisation has proven to be disallowing the limitations of the MVA as contained in section 29¹⁷ to take full effect and to allow those who are not suppose to benefit from the MVA Fund to do so.

The question which then emerges is, why does the MVA Fund limits the benefits of road accident victims who were travelling on un-properly seat fitted vehicles while it allows accident victims who are not entitled to benefit from he MVA Fund in terms of section 26 and 27 to benefit under the domain of stabilisation .

The Namibian Constitution is the Supreme law of the land and all laws not in conformity with the Constitution can be declared invalid and thereby unconstitutional by a competent court.¹⁸ Chapter 3 of the Namibian Constitution contain rights and freedoms which are fundamental, this chapter ought to be accorded the necessary honour and upheld by all organs of state, agencies as well as by individuals. The Research therefor further seeks to answer the question whether Section 27 (1) (e) of the MVA Fund Act is compatible with the constitutional provisions i.e. the discrimination clause as contained in Article 10.¹⁹

¹⁶ Act No. 10 of 2007.

¹⁷ *ibid*

¹⁸ Article 1 (6) of the Namibian Constitution.

¹⁹ Of the Namibian Constitution.

Having illustrated the consequence of travelling on (un-properly seat fitted vehicles) with regards to the MVA claims, the question whether the provision of section 27(1) (e) is constitutional or not still stands.

1.3 SIGNIFICANCE OF THE TOPIC

The object of the research is to provide an overview on the legal ramifications of the provisions of section 27 (1) (e) of the *MVA Fund Act No.10 of 2007*. Further the significance of the research is to bring to the fore and expose that there are limitations in Section 27(1) (e) of the *MVA Act 10 of 2007* and that these limitations may be unconstitutional, it will also provide suggestions as to how best these limitations can be addressed.

1.4 RESEARCH METHODOLOGY

The main research method employed in this research includes documentary research (desktop study). A qualitative evaluation was utilised for this research paper leveraging subjective methods such as interviews to collect substantive and relevant data. Interviews were conducted with the corporate lawyers of the MVA Fund for the solicitation of information. Such a qualitative approach was valuable due to the varying experiences and knowledge of the MVA Fund lawyers on the subject matter. It should be noted that neither the Namibian nor South African jurisprudence has pronounced on the matter thus great reference will be made to the opinions of the MVA Fund Corporate Lawyers, as well as the Namibian Constitution. It is appreciated that the provision at the centre of this research is relatively new and has not been brought before court for decision. Reliance will also be on the South African Secondary data on the subject of third party compensation which will form the basis of the introduction to the research problem.

1.5 RESEARCH QUESTIONS

- What are the limitations of Section 27(1) (e) of the *MVA Fund Act 10 of 2007*?
- Whether the fact that a claimant was travelling on improperly seat fitted vehicle should be a determinant factor for exclusion/limitation of liability?
- Whether section 27(1) (e) does not discriminate against...And thereby being unconstitutional?

1.6 LITERATURE REVIEW

According to Cooper,²⁰ towards the 19th century a motor vehicle was designed to transport people which then replaced the animal drawn vehicles which were used as modes of transport. A motor vehicle was viewed as a technical machine thus required skills and the driver to exercise due care to avoid causing harm to others ,a motor vehicle is regarded to be a very dangerous mode of transportation, thus the need to be cautious when operating one.

The South African Courts employed the principles based on the tort of negligence in determining liability in motor collision cases, they applied the doctrine of duty of care and that of contributory negligence, thereby entrenching the all or nothing rule,²¹ as a consequence the motor car necessitated the reform of road traffic legislations. The Motor Vehicle Accident Act's were then enacted as a consequence.

Motor vehicle accident compensations were then made part of third party compensation. The concept of third party compensation refers to the claim of a victim who suffers injury as a result of negligent driving of a motor vehicle. The entitlement arises as a result of his injury or of the death of his breadwinner caused by the negligent and unlawful driving of a motor vehicle.²² These claims have been referred to as Motor Vehicle Accident claims (MVA Claims). The Motor Vehicle Accident claims are generally regulated by legislation which shift the liability away from the wrong doer to a statutory created fund provided the requirements set out in the legislation governing such a body are fulfilled.

The MVA Fund has taken a proactive step in compensating road accident victims, it is mandated to provide support to all road accident victims, and this has for ages since the introduction of third party compensation been the mandate of the MVA Funds in some countries such as Namibia, South Africa, Swaziland and Botswana. In many other countries the system operates largely as insurance brought by drivers themselves.

²⁰ Cooper,W.E.(1996).*Delictual Liability In Motor Law*. Cape Town: Juta and Co LTD, p.1.

²¹Cooper,W.E.(1996).*Delictual Liability In Motor Law*. Cape Town: Juta and Co LTD, p. 3.

²² Klopper,H.B.(2000).*Law of third Party Compensation* 1sted.Pretoria :Lexis Nexis: Butterworths, p.1.

Klooper,²³ states that the Motor Vehicle Accident Fund does not always incur liability for all claims arising from motor vehicle accidents, in most instances the liability of the motor vehicle Fund is limited by operation of certain provisions contained in the governing legislation the object of the exclusion and limitations of the liability of the Motor Vehicle Accident Fund is to prevent the claimants from abusing the system. Limitations and exclusions of the Motor Vehicle Accident Fund are contained in legislations regulating each Fund.

Klooper,²⁴ further states that certain claims of third party passengers against the RAF (Road Accident Fund) are restricted to a maximum amount by virtue of the operation of the provisions of the Act regulating third party compensation. If a claim exceeds the applicable maximum, the balance may be recoverable from the wrongdoer(s).

Motor Vehicle Accident Fund legislations are drafted very differently depending on the availability of resources and other incidental matters, thus it is very difficult to find a similar provision to that of Section 27(1) (e) of the *MVA Fund Act*.²⁵ Section 27(1) (e) provides that: “if a person claiming benefits under section 25 was injured when he or she was being conveyed otherwise than in or on a seat properly constructed and affixed to the motor vehicle for the purpose of conveyance of persons, the monetary benefits in terms of section 25 (1) (a) and (c) otherwise payable is reduced by up to 50%”.

The basis for the MVA compensation is also similar to the Law of Delict which provides that any person who causes harm to another must compensate the victim and the person whose rights are infringed has a corresponding right to claim compensation.²⁶ MVA claims arise as a result of third party compensation, which is statutory based, even though there is an element of compensation, the wrong doer’s damages are absorbed by the MVA Fund which act as the insurer while as with delict the victim claims from the person who causes the harm. The law of third party compensation can be argued to have branched out of the law

²³ *ibid*,p. 21.

²⁴ Klooper,H.B.(2000).*Law of third Party Compensation* 1sted.Pretoria :Lexis Nexis: Butterworths ,p.26.

²⁵ No. 10 of 2007.

²⁶ Neethling J. (2001).*Law of Delict* 3th ed. Durban: Lexis Nexis: Butterworths, p. 3.

of general compensation as contained in the law of delict. The law of delict's principles can therefor be referred to as the underlying principles of third party compensation.

Neethling et al,²⁷ states that a victim qualifies to receive compensation where he has suffered damage due to the action of someone. He further states that the general function of compensation may take the following specific forms:

- a) **Compensation for damage**, damages is a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as future patrimonial and where applicable, non patrimonial damage. Money in this regard is indented as the equivalent of damage.²⁸
- b) **Satisfaction**, if damage or loss is incapable of being compensated because money cannot be a true equivalent of the impaired interest, satisfaction becomes relevant as a function of the law of delict. Satisfaction implies the reparation of damage in the form of injury to personality by *inter alia* effecting retribution for the wrong suffered by the plaintiff and by satisfying the plaintiff and or the community's sense of justice.²⁹

I have not come across a similar provision in other jurisdictions, but what our Act has in common with other countries Acts is that they all contain provisions on either limitations or exclusions of the MVA Fund's liability, each Act containing limitations which fit their country either socially or economically.

The South African Acts on the third party compensation scheme refer to exclusions only and in these instances the Fund can not compensate the victim. Our Namibian MVA Fund Acts go further than the South African Acts as they include exclusions and limitations of benefits. Exclusions simply means when the victim is prevented from benefiting and claiming from the Fund because of reasons outlined in the Act such as breach of the law while on the other hand limitations means that the victim can be compensated but can only be compensated to a certain extent because of non compliance to certain provisions of the Act.

²⁷ Neethling,J, et al.(2010).*Law of Delict*,6th ed. Durban:Lexis Nexis,p.211.

²⁸ Neethling J. (2001).*Law of Delict* 3th ed. Durban: Lexis Nexis: Butterworths, p.3.

²⁹ *ibid.*

1.7 LIMITATIONS

There is very limited information on the topic which proved to be very difficult in conducting the research. The problem identified in this research has not really been discussed, being one of the reasons for lack of literature on the research question. In order to expose that section 27(1) (e) creates very difficult problems which are not found in literature, it will be my own analysis from the general principles of compensation which I will use throughout this research. It is further this gap which various authors, who have written on third party compensation, have not filled that necessitated the research in greater measure.

CHAPTER 2

Third party Compensation as operational in Namibia

2.1 Introduction

Namibia's law on third party compensation is rooted in one piece of legislation, The *Motor Vehicle Accident Fund Act 10 of 2007*, which repealed the *Motor Vehicle Accident Fund Act 4 of 2001*. The *Motor Vehicle Accident Fund Act 4 of 2001* repealed the *Motor Vehicle Accident Fund Act of 1990*, which was the Act which initially gave birth to the Namibian Motor Vehicle Accident Fund.³⁰ The Fund is mandated "to provide for the establishment, management and administration of the Fund, to provide assistance and benefits to persons injured in motor vehicle accidents and dependents of persons killed in such accidents and to provide for incidental matters".³¹

The concept of third party compensation refers to the entitlement of a victim who suffers injury as a result of negligent driving of a motor vehicle. The claim arises as a result of his injury or of the death of his breadwinner caused by the negligent and unlawful driving of a motor vehicle.³² These claims have been referred to as Motor Vehicle Accident claims (MVA claims). The Motor Vehicle Accident claims are generally regulated by legislation which displaces the liability away from the wrong doer to a statutory created fund provided the requirements set out in the legislation governing such a body are complied with; in Namibia it is called the Motor Vehicle Accident Fund. The Law of delict is the underlying principle of the third party compensation i.e. MVA claims.

In terms of the principles of the law of delict, claims can be based on the recovery of damages and prejudice to certain rights of personalities³³ caused by the negligent and

³⁰ Section 2 of the *Motor Vehicle Accident Fund Act of 1990* establishes the MVA Fund.

³¹ Preamble of the *Motor Vehicle Accident Fund Act No.10 of 2007*.

³² Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p.1.

³³ Neethling, Potgieter and Visser. (1999). *Law of Delict*. Durban: Butterworths, p. 244. Infringement of personality rights can be in the form of pain and suffering due to prejudice a person's *corpus*.

unlawful acts of a driver. It is a general principle of the law of delict for the victim of wrongdoing to be compensated.

This model of compensation operates in Namibia as borrowed from South African legislations. There is no jurisprudential writing on the subject in Namibia thus all the common law principles with regards to the subject are contained in South African literature which as a result of independence forms part of our legislations. This Chapter will highlight the general principles of third party compensation as operational in Namibia.

2.2 The liability of the Motor Vehicle Accident Fund

The stratagem deployed by third party compensation legislations in order to ensure that a motor vehicle accident victim is protected against the possibility of non recovery of his damage due to the fact that the wrong doer (the driver) is a man of straw and unable to pay the victim's loss or damage is the suspension of a victim's common law delictual claim and the transposition thereof to a statutory created fund.³⁴

As a consequence a third party is by law allowed to institute his claim against the Motor Vehicle Accident Fund. This position has been set out In *Van Rensburg and Ano v Russer*³⁵ where **Levy J**, considered that in terms of section 52³⁶ of that Act,³⁷ where a person was entitled to claim from the Motor Vehicle Accident Fund or its agent or damages for bodily injury arising out of a motor vehicle accident, that person was not entitled to claim from the owner or the driver of the vehicle responsible for the accident unless the Motor Vehicle Accident Fund was not able to pay.

Section 24 of the Act set out the grounds of liability of the fund, set out verbatim, the section provides as follows:

S24 (1) "A person who has suffered loss or damage as a result of injury to himself or herself or as a result of the death or injury of any person in neither case caused by or arising out of the driving of a

³⁴ Klopper, H.B. (2000). *Law of Third Party Compensation* 1sted. Pretoria : Lexis Nexis: Butterworths, p. 22.

³⁵ 1991 (3) SA 471 (NamHC).

³⁶ A corresponding provision to section 24 of the *MVA Fund Act 10 of 2007*.

³⁷ Being the relevant Motor Vehicle Accident legislation at the time the case was decided.

motor vehicle by any person, including the person himself or herself in Namibia is subject to the conditions, limitations and exclusions imposed by this Act, entitled to the benefits prescribed by this Act”.

24(2) subject to this Act, the Fund in the case of a claim for benefit under this section, must award the benefits prescribed in section 25 to a person who has suffered loss or damage –

- (a) As a result of injury to himself or herself; or
- (b) As a result of the death or injury of any person

Caused by or arising out of the driving of a motor vehicle by any person including the person himself or herself in Namibia.

Giving the above quoted section my own interpretation it means the MVA Fund is mandated to compensate persons who have suffered loss or damage as a result of injury to himself or herself or as a result of death or injury of any person caused by the driving of a motor vehicle by any person who is or was in Namibia at the time the accident occurred. The road accident victim’s claim for compensation is not based on the driver’s degree of negligence.

Section 24 stipulates clearly the Fund’s liability and limitations thereto, applying rules of interpretation³⁸ to the wordings of section 24; this section compels the Fund to pay out benefits to an “injured person” or “dependent of such person”, provided the injury or the death is caused by a motor vehicle accident. This form of liability is made clear by the usage of the word “must award the benefits”.

The effect of section 24 of the MVA Fund Act is to substitute the claimant’s common law rights to a delictual claim against a wrong doer, the substitution ceases where the Act specifically excludes or limits liability to the extent of such exclusion and limitations.³⁹ In the case of *Rose’s Car Hire v Grant*,⁴⁰ the Court held that where the Act excludes or restricts the liability of the Fund, the common law right to delictual claim becomes fully revived.

2.3 Requirements for liability

³⁸ Applying the literal method of interpretation.

³⁹ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p.23.

⁴⁰ 1948 (2) SA 466 (A).

Within Section 24 of the Act, there are certain requirements which have to be met before the MVA Fund can be liable to compensate road accident victims. For the liability of the MVA Fund, there should be a person who has suffered loss or damage as a result of the conduct of the driver. The requirements will now be discussed in details.

2.3.1 Road Accident Victim also referred to as the claimant and as the third party

Section 24 distinguishes between two classes of third parties that are entitled to claim against the MVA Fund, these are:

- persons who have suffered loss or damage as a result of injury to himself or herself and;
- persons who have suffered loss or damage as a result of the death or injury to any person.

The above given classes of road vehicle accident victims who can claim from the MVA Fund do not clearly define what constitutes a third party being the term frequently used, the concept of third party has a very technical meaning.

i. The term third party

The concept “third party” has its origin in the *MVA Act of 1942*,⁴¹ in terms of which an owner was compelled to insure against the possibility that his negligent driving may cause damage to other persons. The drivers were expected to complete insurance agreements in which the driver was described as “the first party”, the insurance company was described as the “second party”, and the person who has suffered damage as a result of the negligent driving of the driver was referred to as “the third party”. Thus the term third party means a road accident victim who has suffered damage or injury as a result of the bodily injury of him/herself or the death of or injury to his or her breadwinner as a result of the negligent and unlawful driving of a motor vehicle.⁴²

ii. Bodily injured third party

⁴¹ *Motor Vehicle Insurance Act of 1942*.

⁴² Klopper, H.B. (2000). *Law of Third Party Compensation* 1sted. Pretoria :Lexis Nexis: Butterworths, p. 30.

Any person who suffers bodily injuries as well as any person who is legally obliged to compensate such person for his/her bodily injuries as a result of the negligent and unlawful driving of a motor vehicle or other unlawful act which can be linked to the driving of a motor vehicle qualifies to be a third party. Third parties as referred above include:

- An unborn child as expounded in *Pinchin and another NO v Santam Insurance*,⁴³ in this case the court had to decide whether an unborn child has an action to recover damage for pre-natal injuries sustained by it in a motor vehicle accident. The court held that an unborn child does have an action to recover damages for pre-natal injuries.
- A minor assisted by his or her guardian⁴⁴
- The guardian of a minor as expounded in *Du Preez v AA Mutual Insurance Association*⁴⁵
- A married person married in or out of community of property, this was the case in the case of *Rohloff v Ocean Accident and Guarantee Corporation Ltd*,⁴⁶ even where such a person is injured by the negligence of his or her spouse.
- An un-rehabilitated insolvent, in the case of *Santamversekeringsmaatskappy Bpk v Kruger*,⁴⁷ the court had to make a finding as to whether the insolvent was entitled to special damages arising out of his injuries caused by the unlawful and negligent driving of a motor vehicle. The court held in the affirmative.

iii. Third parties who may suffer loss of maintenance

As a general principle of law, bread winners are obliged to maintain their spouses as well as their children. In terms of section 3(1) of the *Maintenance Act*⁴⁸ parents have a duty to maintain their child who is unable to support himself/herself; both parents of the child are

⁴³ 1963 (2) SA 254 (W).

⁴⁴ Since minors do not have full capacity, they act through their guardians.

⁴⁵ 1981(3) SA 795 (E).

⁴⁶ 1960 (2) SA 291 (A).

⁴⁷ 1978 (3) SA 657 (AD).

⁴⁸ No. 9 of 2003.

responsible to maintain their child. The duty to support was defined in *S v Kayoka*⁴⁹ where the court held that “at common law there existed a duty of support between blood relations and spouses”; the duty to support operates *ex lege*. It therefore means dependents of a road accident victim who dies as a result of such an accident are entitled to claim loss of support from the MVA Fund.

iv. Third parties may suffer loss in the following ways:

- Where a third party suffers loss of maintenance (either fully or partially) as a result of the injury to his or her bread winner
- Where a third party suffers loss of maintenance as a result of the death of his or her bread winner.

The persons covered under this category are widows, widowers, children of the deceased breadwinner and generally people who are dependent on the deceased for maintenance. The MVA Act defines a dependent as “in relation to a person involved in a motor vehicle accident means any person being a spouse or a minor child of such person or a disabled or indigent person legally entitled, other than in terms of contract, to monetary maintenance from such person and includes a spouse in a customary Law union and children of such union” all categories of persons falling under this definition qualify as dependents and are entitled to a claim of loss of support.⁵⁰

2.3 2. Conduct: Driving a Motor Vehicle or other unlawful act committed by certain persons

As a principle of liability in respect of third party claims, there should have been a conduct of a certain prescribed nature and must be performed by a specific person.⁵¹ This requirement has further sub requirements namely, driving, motor vehicle, other unlawful act and particular actors being the driver, owner or other person. The sub requirements will now be extensively discussed. The requirement of unlawfulness is not fully supported in the new

⁴⁹ 1991 NR 369 (HC).

⁵⁰ Section 1 of the MVA Act 10 of 2007.

⁵¹ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p.36.

Act, meaning liability will rest on the Fund even where the accident may not have been a result of negligence or unlawfulness on the part of the driver or owner of the vehicle.

v. Driving

The meaning of the word driving has been considered in the case of *Nkhala v Mutual en Federale Versekeringsmaatskappy Bpk*⁵² to mean “driving implies that the vehicle is in motion .In this sense, the word has been described as meaning the urging on and directing of the course of a vehicle while it is in motion as well as all other acts reasonably or necessarily incidental thereto”. This may include the acceleration of the vehicle, parking, braking and bringing a vehicle to a stand still point. There must always be a direct relationship between the driving act and other actions.

2.3.3 Motor Vehicle

The conduct referred to in section 24 is limited to that of driving a motor vehicle. The MVA Act defined motor vehicle as “a vehicle which is designed or adapted for propulsion or haulage on a road by means of fuel, gas electricity and it includes a trailer, caravan, an agricultural or other implement designed or adapted to be drawn by that vehicle and any other vehicle that may be prescribed.⁵³ In terms of this definition there are two tests involved in determining what constitute a vehicle.

i. Propulsion test

The definition provides that fuel, electricity or gas must propel the vehicle, and thus any other form of propulsion such as a bicycle would not constitute a vehicle for the purposes of the definition in the Act.

ii. Design test

In *Chauke v Santam Limited*,⁵⁴ it was decided that the fact that the vehicle is capable of being used on the road does not mean such a vehicle was designed for the propulsion or haulage on a road. Klooper⁵⁵ explains that design for propulsion or haulage on a road is

⁵² 1985 (1) SA 824 (O).

⁵³ Section 1 of the MVA Act 10 of 2007.

⁵⁴ 1997 (1) SA 178 (A).

⁵⁵ Klooper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p.43.

intended to mean the ordinary, everyday and general purpose for which the vehicle was designed and constructed for the road.

A vehicle will not comply with the design test if an ordinary reasonable person would perceive that the driving of the vehicle in question would be hazardous to the normal road traffic unless special precautions and adaptations are made.⁵⁶

In order for a claimant to succeed in his/her claim against the MVA Fund the conduct which caused the harm/damage should have been that of driving a motor vehicle. According to the tests above a motor vehicle for the purposes of MVA claims will be considered to be a vehicle which is propelled by fuel, electricity or gas and if that vehicle is designed for being used on the road.

In terms of the governing legislation on traffic and transportation in Namibia,⁵⁷ there is no specific design for a passenger's vehicle. It is then deemed correct for someone to assume that for as long as there is no law in Namibia prescribing the manner in which a passenger vehicle should be designed; passengers in terms of the law can travel either on vehicles not fitted with passenger seats such as at the back of a Bakkie, Van e.t.c.

The MVA Fund in terms of its governing legislation, section 27(1) (c),⁵⁸ has set out the design of passenger vehicles. Giving the section a literal interpretation in terms of the design of passenger vehicles, MVA Fund Act requires all passenger vehicles to be fitted with seats. Even though this has been set out to be a requirement for purposes of claiming, many Namibians are not aware of this requirement simply because it is not contained in the relevant authorities regulating traffic and transportation in Namibia; it is this difference in prepositions which has prompted the research.

2.3.4. Conduct: other unlawful act

The legislator intentionally wanted to distinguish between the driving of a motor vehicle by a driver on the other hand while on the other unlawful acts committed by the driver or other

⁵⁶ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p.43.

⁵⁷ The *Road Traffic and Transportation Act* 22 of 1999.

⁵⁸ Of the *MVA Fund Act* 10 of 2007.

persons on the other. This distinction means that if the driver, owner or the employee of the owner or any other person commits any other unlawful act other than the negligent driving of a motor vehicle and then act may qualify as other unlawful act as it is stipulated by the Act, an example of the unlawful acts being referred to here is when a driver or an owner of a vehicle permits a person to drive his vehicle without a driving license.⁵⁹ In the case of *Ngedle v Marine and Trade Insurance*,⁶⁰ it was held that failure or neglects to maintain a vehicle properly amounts to an unlawful act.

2.3.5 Fault: Negligence

Negligence is a requirement for liability but intentional acts will also give rise to liability. The concept of negligence is defined to mean “when a person is negligent he/she is reproached for his or her conduct or attitude of carelessness and his/her inattentiveness because his/her conduct neither does nor comply with the standard of care legally required of him or her”.⁶¹ According to Cooper⁶² the standard used to judge the conduct of a person is that of a reasonable person also referred to as a *bonus paterfamilias*.⁶³ When the principles of negligence are applied to a motor accident the court in determining the liability places itself in the shoes of the driver at the time of the accident, the conduct of the driver is then compared to that of a reasonable driver (person) under the same circumstances.⁶⁴

A driver will be negligent if it is evident that a reasonable person in the same circumstances would have acted differently if the damage caused were reasonably foreseeable and preventable.

The slightest degree of negligence is sufficient to satisfy the requirement of negligence, in *Cape Town Municipality v Paine*,⁶⁵ the court held that the law does not recognise

⁵⁹ See *Protea Assurance Co Ltd v Matinise* 1978 SA (1) 963 (A).

⁶⁰ 1969 (4) SA 19 (W).

⁶¹ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p. 53.

⁶² Cooper, W.E. (1996). *Delictual Liability in Motor Law*. Cape Town: Juta and Co, p.76.

⁶³ Reasonable person is not an actual person but is the personification of society's perception of the accepted standards of conduct under certain circumstances. A reasonable person is typically an average person who is not exceptionally gifted, cautious or sophisticated but on the hand, is not careless or injudicious when taking chances, Cooper, W.E. (1996). *Delictual Liability in Motor Law*. Cape Town: Juta and Co, p.78.

⁶⁴ Cooper, W.E. (1996). *Delictual Liability in Motor Law*. Cape Town: Juta and Co, p.76.

⁶⁵ 1923 AD 207.

differences of degree or type of negligence, a person is negligent as soon as he/she does not comply with the standards of a reasonable person. It should be highly noted that the degree of negligence has no bearing on the amount of compensation to be claimed and recovered.

iii. Negligence: Duties owed by the driver

For purposes of third party compensation, for a plaintiff to succeed in his claim, he must prove that there was negligence on the part of the defendant.⁶⁶ The following duties have been established for the drivers, non compliance of these duties constitutes negligence. The duties are:

- i. In *Butt v Van der Camp*,⁶⁷ the court held that a driver has a duty to keep a proper outlook and this duty goes further to require of a driver to be a ware of other traffic. In *Kandenge v Minister of Works, Transport and Communication and Another*,⁶⁸ the court held as follows” A driver who decides to cross the path of oncoming traffic at an intersection by means of a right hand turn must indicate his intention to do so in a manner visible to other road users.⁶⁹
- ii. It was decided in *Olivier v Rondalia Versekeringsmaatskappy*,⁷⁰ that a driver has a legal duty to reduce his speed in circumstances were a reasonable driver foresee that a person would cross the road in front of the vehicle. A driver is also duty bound to drive at a reasonable speed.
- iii. In *AA Onderlinge Assuransie v De Beer*,⁷¹ it was held that the driver must always keep left.
- iv. In *UNISWA Insurance Co Ltd v Bezuidenhout*,⁷² the court decided that a driver must maintain a safe following distance, should there arise a sudden stop in traffic.
- v. In *Bredell v Commercial Union Versekeringsmaatskappy Beperk*,⁷³ the court held that a driver has a legal duty to maintain his vehicle properly.

⁶⁶ This was held in the case of *Bok v Motor Vehicle Accident Fund of Namibia* 2008(2) NR 722.

⁶⁷ 1982 (3) SA 819 (A).

⁶⁸ 2002 NR 322 HC.

⁶⁹ This was also re affirmed in the Namibian Case of *Kasuto v Trans Namibia Holdings (Pty) Ltd and Another* 2007 (1) NR 192 (HC).

⁷⁰ 1979 (3) SA 20 (A).

⁷¹ 1982 (2) SA 603 (A).

⁷² 1982 (3) SA 957.

⁷³ 1977 (4) SA 464 (C).

In *Johannes Jurie Jacobus Van Der Berg v MVA Fundof Namibia*,⁷⁴ it was held that drivers should act with due care and responsibility in order to avoid accidents.

Contributory Negligence

If the negligence of both parties contributed in causing the accident, the relative position of the parties regarding the damage that they are entitled to recover is regulated by section 1(1) (a) and (b) of the *Apportionment of Damages Act*.⁷⁵ In terms of the provisions of this Act, the court reduces the recoverable damage of each party relative to the respective fault in the causing of the accident, in determining the relative negligence the reasonable man's test is used.

In *Johannes v South West Transport (Pty) Ltd*,⁷⁶ the appellant and respondent's motor vehicles were involved in a collision. Appellants' vehicle was stationary when it was struck from behind by respondent's vehicle. The court confirmed with the court *a quo* that the appellant's vehicle had been on the surface of the tarred road either partially or entirely and the court apportioned negligence in the ratio of 75% to the appellant and 25% to the respondent.

2.3.6 Causation

Once it has been established that the conduct which is the driving of a motor vehicle is negligent and resulting in damage, it is also very important for the existence of a causal link between the conduct and the resulting injury, death and consequent damages. Under section 24 of the *MVA Fund Act*,⁷⁷ Klopper⁷⁸ identifies two phrases which are linked to causality these terms are "caused by" and "arising from", at first glance he interprets the phrases to be similar and are therefore tautologies and should be treated synonyms.

⁷⁴ (P) I 1478/2006

⁷⁵ No. 34 of 1956.

⁷⁶ 1992 NR 358 (HC).

⁷⁷ Act No. 10 of 2007.

⁷⁸ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p. 87.

The court however in *Barkett v SA National Trust and Assurance*,⁷⁹ held that these words are not to be interpreted as synonyms. By applying the rules of interpretation of statutes, the phrases have to be given two different meanings.

The meaning of the phrases “caused by” the driving of a motor vehicle can only be seen as causing the death or injury of a person if the death is the immediate and direct consequence of the driving of the motor vehicle. In the Case of *Wells and another v Shield Insurance Co*⁸⁰ the Judge expressed himself as follows “I am not convinced that the phrases “caused by”, when it appears in a statute or contract, should normally be equated with the concepts of causation that the law has evolved in connection with the liability for delict or breach of contract”.

In the case of *Minister of Pensions v Chenne*⁸¹ the judge said that in the present case however, it is necessary to assign to the phrase “caused by” a meaning which will distinguish it from “arising out of” and this is effectively and satisfactorily achieved by limiting its application to instances where the injury can be said to have been directly caused by the driving of the insured motor vehicle....”.Klopper⁸² says that in terms of the general interpretation of statutes the words caused by and arising from should be interpreted to indicate the common law principles of causation, but this interpretation makes it difficult to distinguish whether the conduct which is not driving in the strict sense has caused the death or injury of a person and if such injury or death arose from such a driving related conduct.

The court in *Wells and another v Shield Insurance Co*⁸³ adapted the common law *conditio sine qua non* test in relation to driving related activities and to give a restricted meaning to the phrase “arising from”. The restricted meaning of the phrases “ arising from” results in these words indicating those circumstances where the driving did not directly cause the death or injury of a person but where the causal connection between such conduct and the death or injury of a person can nonetheless still be construed. The driving related conduct

⁷⁹ 1951 (2) SA 353.

⁸⁰ 1965 (2) SA 865 (W) at 869 C-E.

⁸¹ [1946] 2 ALL ER 719 at 721.

⁸² Klopper, H. B.(2000).*Law of Third Party Compensation* 1sted.Pretoria :Lexis Nexis: Butterworths, p. 88.

⁸³ 1965 (2) SA 865 (W).

should be a *sine qua non* of the death or injury of a person before it can be said that the death or injuries arose from the driving; provided that such conduct can, according to the standards of common sense, be sufficiently connected or to be found to be related to the driving related activity.⁸⁴

2.3.7 The damage or prejudice must occur at any place within the republic of Namibia.

This requirement is found in section 24 of the MVA Fund Act.⁸⁵ Damages caused in other areas beyond Namibia are subject to other countries Motor Vehicle Accident laws within which the accident has occurred. Before the liability of the MVA Fund is determined it is of paramount importance for the claimant to prove beyond a shadow of a doubt that all the requirements as discussed above are satisfied.

⁸⁴ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths , p. 89.

⁸⁵ Act 10 of 2007.

CHAPTER 3

The damage recoverable from the MVA Fund

3.1 Introduction

In terms of section 23 of the Act,⁸⁶ the MVA Fund is mandated to respond to accidents, Section 24,⁸⁷ establishes the liability of the MVA Fund as well as the amount of claims to be awarded, section 25⁸⁸ goes further to provide for the benefits that the MVA Fund can award to road accident victims, all these sections are very important when it comes to the determination of the damages or rather awards to be awarded to the road accident victims, thus they all need to be discussed together as they are inter dependent. The outlined sections will be discussed below extensively in the determination of the damages recoverable from the MVA Fund.

Not all damages caused by the negligent or unlawful driving of a motor vehicle which consequently causes an accident can be recovered from the Fund, there are limitations and exclusions contained in the Act, the Fund will only be in a position to compensate fully if the limitations and exclusions do not apply to the matter being considered at a given time. The MVA Fund Act provides for two types of limitations, those limiting the amounts recoverable from the Fund and those limiting what is recoverable in instances where negligence is a factor from the claimant.

3.2 Section 23 of the MVA Fund Act⁸⁹

Section 23 provides as follows:

- (1) Even though the fund has not received a claim in respect of injury or death suffered in a motor vehicle accident, the fund may take reasonable steps to ensure that:
 - a) A motor vehicle accident is attended without avoidable delay and
 - b) An injured person requiring medical treatment is conveyed to a hospital and if a hospital is not accessible to such other medical treatment facility as is accessible.

⁸⁶ Act No. 10 of 2007.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

- c) An injured person's condition is stabilized before it makes a determination of liability in terms of section 24 and 25, or
- d) The body of a person killed is conveyed to a mortuary.

This section also outlines the duties and responsibility of the MVA Fund which is to assist all road accident victims before the MVA Fund embarks on the investigations and determination of liability and also to determine how much a road accident victim is to be awarded.

Currently, when it comes to the determination of liability of the Fund, the central questions to be answered by the claimant and the MVA Fund, are whether the MVA Fund is liable or not and what are the limitations placed on such a claim? Based on these questions asked the fund either repudiates the claim or compensates the claimant by awarding applicable benefits.

The MVA Fund is mandated to respond to road vehicle accidents. In terms of Section 23(1) (c),⁹⁰ before the fund determines liability as provided for in the Act it must ensure that the victim/s of the road accident is/are in a stable condition. The application of the concept of stabilisation has proven to be a problematic concept to many persons; the MVA Fund as well as doctors have a different definition of stabilisation.

By relying on section 23(1) (c)⁹¹ even persons who are guilty of contravening section 26 benefits from the MVA Fund while they are not entitled to benefit due to the breach of the law, further by relying on section 23(1)(c) even those affected by the limitations in section 27(1)(e) benefit at least till stabilisation has been effected. Since all road accident victims under the domain of stabilisation are entitled to benefit from the fund this has proven to be problematic because by allowing all persons to benefit under the domain of stabilisation defeats the whole purpose of having exclusions and limitations of liability.

⁹⁰ *MVA Fund Act No. 10 of 2007.*

⁹¹ *ibid.*

Giving stabilisation a broader definition, it would mean: the stage where the patient is considered to be out of a medical emergency. Since this concept is not determined nor defined in the Act; the MVA Fund relies on medical practitioner's definitions. During stabilisation all victims of road accidents get treatment and even those who in terms of the exclusions are not entitled to benefit. Naturally, therefore there should be a cut of point to allow the limitations as provided for in Section 26⁹² to come in to play and to disallow persons who are not entitled to benefits in terms of the Act to benefit.

According to the MVA, a patient is deemed to be in a stable condition as soon as he/she gets out of a critical condition, i.e. getting out of an Intensive Care Unit. It is only at this point that investigations start in order to determine whether the patient qualifies to benefit under the MVA Act. This method is not satisfactory as it is not consistent with the aims of section 26 which aims at excluding victims who are disqualified in terms of its provisions to benefit from the MVA Fund.

It sounds like a contradiction in terms of the same Act. Should it be asked what the point or rationale is for benefiting accident victims till stabilisation and then thereafter dump them by the wayside without more benefits? This is a punitive measure, and it evidences the fact that the current legislation is a hybrid system; it did not completely divorce its mode of application from its predecessors which was punitive to claimants where they were negligent or unlawful as regards the causing of the accident or inflicting injury or causing death upon themselves.

3.3 Different types of damages that can be recovered from the MVA Fund

The benefits that can be awarded to a victim of a road accident are contained in section 25. In terms of section 25 of the Act;⁹³ reference is made to two different types of damages i.e. Damages or losses occasioned by the bodily injury to a third party and the damage or loss caused by the bodily injury or death of any other person.

⁹² *MVA Fund Act No.10 of 2007.*

⁹³ *ibid.*

3.3.1 Loss or damage as a result of bodily injury to a third party

It is very important for one to determine what constitutes bodily injury, in this respect a distinction has to be made between patrimonial⁹⁴ and non patrimonial⁹⁵ losses. The legislator by referring to damage in the Act refers to both patrimonial as well as non patrimonial losses caused by prejudice to the body of a person.⁹⁶ Damage to the motor vehicle and other personal belongings damaged as a result of the motor vehicle accident can not be recovered by relying on the scheme of third party compensation. Bodily injury is defined as “all injury which physically affects the body of a person”;⁹⁷ it also includes non physical consequences such as mental illnesses and emotional shock.

3.4 Recoverable damages resulting from bodily injury

a) Medical and hospital costs

Medical and hospital costs are part of the patrimonial damage which flows from the bodily injuries of a third party. These costs includes past, present and future medical expenses occasioned by the bodily injury to a third party. Medical costs which can be awarded by the fund include:

- Reimbursement of costs of medical treatment for physical injury suffered in a motor vehicle accident.⁹⁸
- An undertaking to pay for medical treatment or injury, management in accordance with a treatment plan as prescribed subject to periodic assessment.⁹⁹
- An undertaking to pay for rehabilitation of a person injured in a motor vehicle in accordance with a rehabilitation plan as prescribed.¹⁰⁰
- An undertaking to pay for life enhancement assistance in accordance with a life enhancement plan as prescribed where the injured person has suffered permanent physical or mental incapacity subject to periodic assessment.¹⁰¹

⁹⁴ Financial losses.

⁹⁵ Non financial losses.

⁹⁶ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p. 78.

⁹⁷ Klopper, H.B. (2000). *Law of Third Party Compensation* 1st ed. Pretoria : Lexis Nexis: Butterworths, p. 78.

⁹⁸ Section 25 (1) (c) of the *MVA Fund Act* No. 10 of 2007.

⁹⁹ Section 25(1) (d) of the *MVA Fund Act* No. 10 of 2007.

¹⁰⁰ Section 25 (1) (e) of the *MVA Fund Act* No.10 of 2007.

¹⁰¹ Section 25 (1) (f) of the *MVA Fund Act* No.10 of 2007.

In terms of section 24, future and present medical costs are limited up to N\$ 1500 000,00,¹⁰² despite the true reflection of what the claimant may need, some times claimants who belong to good medical aid schemes are urged to look for extra funding to supplement where the Fund will not be able to cater fully for medical expenses.

b) Loss of income

In an event where a third party suffers loss of legal¹⁰³ income as a result of his bodily injuries due to absence from his employment, business or professional such financial loss can be recovered. Section 25 provides that the Fund may award to the road accident victim loss of income as a result of the accident until such victim attains the age of 60. The Act limits the compensation for loss of income to N\$ 100 000¹⁰⁴ per annum.

3.5 Loss or damage as a result of the bodily injury or death of another

Damage in this context refers to damage suffered not by a third party personally but by such third party as a result of the bodily injury or death of another person. This type of damages refers to a third party's loss of maintenance resulting from either the death or injury of his breadwinner. A claim for loss of support can only succeed if the deceased owed the third party a legal duty of maintenance.¹⁰⁵ Damage results from the death of a breadwinner in the sense that a third party by virtue of such death will lose the claim for maintenance he had against the deceased breadwinner.

A spouse can claim damage for the death of his spouse; a child may also claim the portion of his maintenance for which his parents were legally liable for maintenance. In the case of *Glazer v Glazer*,¹⁰⁶ the court held that minor children have a claim for maintenance from the

¹⁰² Section 24 (4) (a) of the *MVA Fund Act No.10 of 2007*.

¹⁰³ In the case of *Fortuin v Commercial Union Assurance Co of South Africa 1983 (2) SA 444 (c)*, the court had to consider the issue whether a dependent of a deceased who was earning his/her income illegally should benefit from RAF (Road Fund of South Africa).It was held that since that the deceased did apply for a hawker's license although operating without one at the time of his death, as a matter of probability would have succeeded. The plaintiff was then awarded compensation for loss of support.

¹⁰⁴ Section 24 (4) (c).

¹⁰⁵ As per the Maintenance Act No. 9 of 2003.

¹⁰⁶ 1963 (4) SA 694 (A).

estate of their deceased parents. A claim for loss of support will only succeed if it is proven that the death of the road accident victim causes losses for maintenance to his dependents.

3.6 Recoverable damages as a result of the bodily injury or death of another person

a) Loss of support (maintenance)

The amounts payable by a deceased as maintenance but which he is unable to pay due to his death caused by the negligent and unlawful driving of a motor vehicle may be recovered by the third party to which the deceased owed a legal duty to maintain.

In *Van Vuuren v Sam*,¹⁰⁷ it was held that maintenance includes such amounts as the deceased was legally obliged to pay in respect of food, clothing, accommodation, care during illness as well as education. The dependent can only claim for loss of support if the road accident victim derived his income from legal activities.

The benefit for the loss of support is provided for in section 25, the claim for loss of support has been limited to N\$ 100 000.00 per annum.¹⁰⁸

b) Funeral benefits

Before the *MVA Fund Act 10 of 2007*, third parties were entitled to claim reasonable funeral and cremation expenses in respect of a deceased killed in a motor accident. Currently only reasonable funeral expenses can be recovered from the Fund, the reasonable expenses include; the mortuary costs, coffin, and transportation of the deceased body and excludes; expenses such as memorial service costs and refreshments. Section 24 (4) (e) provides that the funeral award is limited to N\$ 7000. Under the current Act the claimant needs only to prove that the deceased died in a motor vehicle accident for the N\$7000.00 to be awarded.

¹⁰⁷ 1972 (2) SA 633 (A).

¹⁰⁸ Section 24 (4) (e) of the *MVA Act 10 of 2007*.

CHAPTER 4

Exclusions and limitations of Liability of the MVA Fund in respect of damages

4.1 Introduction

As a result of the transition of fault based scheme to no fault based scheme albeit a hybrid system, the practice is that all motor vehicle road accident victims are covered in terms of the MVA, with a few being excluded on bases of breach of the law as well as those falling under parts of sections on limitations and exclusions of liability of the Fund. In terms of section 26,¹⁰⁹ victims of motor vehicle accidents are excluded on account of their criminal conduct such as drunken driving, driving without a license or driving a stolen vehicle e.t.c , thus accident victims guilty of contravening section 26 of the MVA Act¹¹⁰ are consequently not allowed to benefit from the MVA fund.

In certain circumstances the liability of the MVA fund is excluded by the operation of provisions of the MVA Act excluding or limiting the liability of the MVA Fund. Claims lodged against the Fund are subject to prescription contained in the Act.

The Motor Vehicle Accident Fund does not always incur liability for all claims arising from motor vehicle accidents, in most instances the liability of the motor vehicle Fund is limited by operation of certain provisions contained in the governing legislation.¹¹¹ The object of the exclusion and limitations of the liability of the Motor Vehicle Accident Fund is to prevent the claimants from abusing the system and to make sure that the Fund is financially sustainable in order that the resource available can be used to assist as many accident victims as possible. Limitations and exclusions of the Motor Vehicle Accident Fund are contained in legislations regulating the motor vehicle accident Funds of each country.

¹⁰⁹ *MVA Fund Act No.10 of 2007.*

¹¹⁰ *ibid.*

¹¹¹ Klopper,H.B.(2000).*Law of Third Party Compensation* 1sted.Pretoria :Lexis Nexis: Butterworths,p. 21.

4.2 The exclusion and limitation contained in section 27 (1) (e)

Section 27 (1) (e) of the MVA Fund Act provides as follows:

“if a person claiming benefits under section 25 was injured when he or she was being conveyed otherwise than in or on a seat properly constructed and affixed to the motor vehicle for the purpose of conveyance of persons, the monetary benefits in terms of section 25 (1) (a) and (c) otherwise payable is reduced by up to 50%”.

4.3 Interpretation of Section 27(1) (e)

The first interpretation technique an interpreter resorts to during the process of interpretation is the literal technique of interpretation. According to this approach the interpreter should focus primarily on the literal meaning of the provision to be interpreted.¹¹² Further, according to this technique, if the meaning of the words is clear, it should be put into effect and indeed equated with the legislature’s intention. If the so called plain meaning of the words is ambiguous, vague or misleading, or if a strict literal interpretation would result in absurd results, such an absurdity can be avoided by deviating from the literal meaning of the provisions to a secondary interpretation to which resort to other aids of interpretation can be justified.¹¹³

The section is understood to mean that road accident victims who were conveyed in a vehicle not designed for the carriage of passengers, or those conveyed in un-properly seat affixed vehicles such as vans, Bakkies, construction vehicles e.t.c will have their benefits of loss of income¹¹⁴ and compensation for injury grant¹¹⁵ reduced *up to* 50% of what ever amount was due in line with the injuries sustained or loss of income applicable. The provision is peremptory hence the words “*up to 50%*”, the discretion is left to the assessors to determine by how much percentage the benefit is reduced which eventually affects the actual amount of the benefits awarded to the claim.

¹¹² Botha.C.(2005).*Statutory Intrepretation*,4th ed. Cape Town: Juta and Co,p.47.

¹¹³ *ibid.*

¹¹⁴ Section 25 (1) (a) of the *MVA Fund Act* No. 10 of 2007.

¹¹⁵ Section 25 (1) (c) of the *MVA Fund Act* No. 10 of 2007.

4.4 The purpose of the section

For the past years the Motor Vehicle Accident Fund has been under the mandate to compensate road accident victims and played a minimal role in road safety. As the years went by, there has been a shift from simply compensating road accident victims to stepping up efforts in road safety. It has been realised that the MVA Fund has to actively engage in road safety in order to bring down the number of accidents on our roads and consequently to reduce the amount of money the MVA Fund spent on road accident victims.

Road safety encompasses many factors which include the mode of transportation. It goes without saying that a vehicle not designed for the carriage of passengers is not safe for purposes of road safety. Even though road safety is key regardless of whether the Act is trying to live up its dreams, this places undue hardship on the nation. Road safety is thus one of the reasons behind the introduction of this section in the MVA Fund Act. The provision is a form of deterrence whereas the converse of it is the realisation of road safety. It means passengers would be wary to be conveyed on a vehicle not designed for the purpose of conveying passengers. They would rather insist on being conveyed on a vehicle designed for this purpose.

Applying the literal technique of interpretation as discussed above and looking at the intention of the legislature in terms of section 27(1)(e), the section means that road accident victims who were conveyed on vehicles not properly fitted with seats will only be compensated up to 50% of what they are entitled to, as compensation from the MVA Fund.

4.5 Section 27(1) (e)¹¹⁶ v Substantive rights

Section 27(1) (e) as outlined above places limitations on the benefits of road accident victims who were travelling on vehicle not designed for the carriage of passengers up to 50%. During the inception of the Act there was so much resistance of the provision by the general public as well as some government organs such as the police beaus they ordinarily use vehicles not designed for the carriage of passengers. According to many people the

¹¹⁶ The *MVA Fund Act* No. 10 of 2007.

section has been perceived as discriminatory, the question as to whether the section is discriminatory will be answered by reference to the Namibian Constitution with the aim of determining whether the section will pass the constitutional test as contained in Article 10 of the Namibian Constitution.¹¹⁷

Namibia is a young developing country with most of the development centered on urban areas. Many parts of our country are still under developed and still in need of the basics such as proper road infrastructures, the societies which have been affected by this are those particularly in rural areas. In many of these parts, vehicles which have been designed for the transportation of passengers do not go there i.e. buses and sedans. The converse of this fact is that even in urban areas use of other vehicles for the carriage of passengers other than those designed for this purpose is very prevalent. This is despite the infrastructure in place.

The reality is that people in Namibia are conveyed in all sorts of vehicles, and many of these vehicles are not designed to carry passengers. Examples of the people who travel on these types of vehicles are construction workers, police officers who are transported in vans, all these categories will be affected by section 27(1)(e) should an accident occur. It is very debatable that for as long as there is no law prohibiting the use of certain vehicles for the transportation of people, people in Namibia can still continue to travel on vehicles such as bakkies.

Communities in rural areas use bakkies and vans to get to their places of residence, some of the citizens use these kinds of vehicles because they can-not afford the passenger designed vehicles while others use these vehicles because the road infrastructures in certain areas do not support the usage of passenger designed cars which are normally small and not suitable for muddy and gravel roads. While in urban areas sedans are the only vehicles allowed to conduct the business of taxis, in rural areas people are mainly transported to towns and where they want to go by means of Bakkies. These reasons leave out a certain part of our society particularly those in rural areas with the only choice of using

¹¹⁷ Act No. 1 of 1990.

cars which the apportionment of damages in terms of the MVA Fund Act will not be in favour of.

Most of the accident victims from un properly seat-fitted vehicles being passengers come from the lower socio-economic sector of our society, and most have little option if at all as regards to their role as passengers in such a vehicle, the question posed here is: is it just and fair to exclude such victims from benefitting equally as others on the bases of socio economic status? i.e. the inability to afford passenger designed vehicles and being located in rural areas with poor road infrastructure.

The Preamble of the Namibian Constitution¹¹⁸ affirms that “recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace”. And that “the said rights include the right of the individual to life, liberty and pursuit of happiness regardless of race, colour, ethnic origin, sex, religion, creed, or social economic status”. *Article 1*¹¹⁹ establishes the Republic as “founded upon the principles of democracy, the rule of law and justice for all”. Keeping in mind the provisions of the preamble of the Constitution, allowing the benefit due to road accident victims who were travelling on un-properly seat affixed vehicles, to be limited to a certain extent, goes against the preamble.

The rights to equality and non discrimination are enshrined in *Article 10* of the *Namibian Constitution*, which is part of Chapter 3 which contains all the fundamental rights and freedoms, which can not be derogated from.

Article 10 of the Namibian Constitution provides as follows:

- 1) All persons are equal before the law
- 2) No person shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Discrimination

¹¹⁸ Preamble of the Namibian Constitution Act No. 1 of 1990.

¹¹⁹ Of the Namibian Constitution Act No. 1 of 1990.

Equality is a controversial issue and according to some authors they define equality as the equal and similar treatment to be afforded to the people of the same class or society.¹²⁰ Discrimination on the other hand can be defined as the unequal treatment; discrimination can also be further defined as differentiation on illegitimate grounds.¹²¹

Article 10 of the Namibian Constitution lists the illegitimate grounds as being sex, race, colour, ethnic origin, religion, creed or social or economic status. *Article 10* does not prohibit discrimination but rather “unfair” discrimination, as not in all instances discrimination is bound to be unfair.

Article 10 was interpreted in the case of *Mwellie v Minister of Works, Transport and Communication*¹²² in which a former public employee claiming wrongful termination of his employment disputed the constitutionality of a section in the *Public Service Act* imposing certain limitations for a claim arising under the Act. He argued that the section violated *Article 10(1)* by providing a limitation period, which is only applicable to certain litigants and not to others.

The High Court decided that despite the unlimited wording of Article 10(1) it is not absolute it also allows reasonable classifications which are rationally connected to a legitimate object. The Court observed that although it classified public employees in different classes all employees are treated the same. It further observed that there was a need to treat public employees different with regards to the time they can bring a law suit based on legitimate reasons.

The Court then held as follows:

“The courts in all the countries referred to me by accepting that equality before the law is not absolute and that the legislature must for good and proper government and also for the protection of those who are unequal, legislate. In legislations reasonable classifications may be made and as

¹²⁰ Currie, I. and De Waal, J. (2005). *The Bill of Rights Handbook*. Cape Town: Juta and Co LTD, p.230.

¹²¹ *ibid*, p.245.

¹²² 1995 (9) BCLR 1118 (NmH).

these classifications are rationally connected to the object of the statute the courts will accept the constitutionality of such legislation”.

Unfair discrimination

Unfair discrimination is discrimination with an unfair impact on its victims.¹²³ The differentiation contained in Article 10(2) will be considered to be unfair discrimination until the contrary is proven. It is submitted that even where there is a rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it, the differentiation might still constitute “unfair discrimination” as envisaged in the constitutional equality clause.¹²⁴

There are little precedents on the issue of unfair discrimination in Namibia at the moment but, the issue of discrimination and unfair discrimination in Namibia has been discussed in the following cases discussed below.

In the *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Elizabeth Khaxas*,¹²⁵ The first respondent visited Namibia and applied for a temporary work permit, since then the employment permits were renewed regularly. The respondent then applied for a permanent resident permit and was informed that her application was unsuccessful the board did not give the respondent any chance to be heard nor did they furnish her with the reasons of such a decision. The respondent challenged the decision of the selection board to be discriminatory as she alleged the decision to have been arrived at on the basis of her lesbian relationship between herself and the second respondent.

The court held: “Although the Namibian constitution does not refer to unfair discrimination, I have no doubt that that is also the meaning that should be given to it”.

Court further stated that: “Equality it has sometimes been said, means equality for those equally situated and indeed, equal treatment for the un-equals, it itself a form of inequality”.

¹²³ Currie, I. and De Waal, J. (2005). *The Bill of Rights Handbook*. Cape Town: Juta and Co LTD, p. 256.

¹²⁴ Van Lonette, J, sarkin, J. and Haeck, Y. (2000). *The Principle of Equality: A south African and A Belgian Perspective*. Maklu: Antwerpen-Apeldoorn, p.148.

¹²⁵ 2001 NR 107 (SC).

The court also held that equality before the law for each person does not mean equality before the law for each person's sexual relationships. It is actually unfair discrimination which is constitutionally impermissible and which infringe *Article 10* of the *Namibian Constitution*. It follows that in considering whether to refuse permanent residence permit to the lesbian partner of a Namibian citizen infringes *Art 8 or 10* of the constitution, such consideration must be done with due reference to the express provisions of *Art 4(3) and 14* of the constitution.

In *Kauesa v Minister of Home Affairs and Others*¹²⁶, the court held that *Article 10(2)* of the *Namibian Constitution* prohibits various types of discrimination and that it is designed to protect all persons against discrimination by any person, entity and organ of state. Further, the court held that in a constitutional challenge based on *Art 10*, the onus lies with the applicant to establish the constitutional infringement.

In another Namibian Case of *Muller v President of the Republic of Namibia*,¹²⁷ the appellant a German national visited Namibia and then decided to settle in Namibia. He then married a Namibian citizen of the name Imke Engelhard. Prior to their marriage they decided to adopt Engelhard as their family name as well as surname. They were advised that it was possible, after the marriage they applied for Engelhard to be both their surname and their application was refused on grounds that it was not possible for a husband to change his surname to that of his wife without complying with certain formalities prescribed by the *Aliens Act 1 of 1937*.

The applicant applied to court alleging that the section 9(1) (a) of the *Aliens Act* was invalid as in conflict with constitutional provisions on equality. The applicant argued that the section was discriminatory and in violation of article 10 of the constitution.

The Supreme Court had to address article 10(2)'s prohibition of discrimination on the grounds stated in the article. The court also had to determine whether the rational test

¹²⁶ 1994 NR 102 (HC) at 103.

¹²⁷ 2000 (6) BCLR 655 (NmS).

applied in the *Mwellie* case was also to be applied to article 10(2) and it was held that it should not.

In deciding whether there has been a violation of art 10 (2) the court looked at four stages. First the court asks if the differentiation has been made between people or categories of people. Secondly one must ask if the differentiation is based on one of the grounds outlined in the sub article of art 10. Thirdly one must determine whether this differentiation amounts to discrimination against some people or categories of people, and lastly if the differentiation amounts to discrimination and if it is unconstitutional.

The court stated that the differentiation will amount to unconstitutional discrimination under art 10(2) only if constitutes unfair discrimination such as is contemplated in the non discrimination provisions in the South African constitution, the court also held that despite the difference in wording between the Namibian and south African constitutions both clauses uses the word “unfair”.

The court then held that not every differentiation based on the enumerated grounds will be unconstitutional but only those which unfairly or unjustly discriminate against the complainants.

Turning back to determining whether section 27(1) (e) of the MVA Fund Act¹²⁸ is discriminatory, the test formulated in the Muller case above will be applied.

Whether the differentiation has been made between people or categories of people.

The differentiation being referred to in section 27(1)(e) is between categories of people and it is directed at, initially people who travel on non passenger designed vehicles, secondly to people of the low socio economic status in our society since often they are the ones who can not afford to buy passenger designed vehicles and thirdly to people in the rural areas who travel on non passenger designed vehicles due to the fact that the infrastructure does not allow usage of passenger designed vehicles such as sedans and buses.

¹²⁸ Act No. 10 of 2007.

- a) **If the differentiation is based on the grounds outlined in Art 10.** The differentiation in section 27(1) (e) is based on the ground named in Article 10 i.e. socio economic grounds.

- b) **Whether the differentiation amounts to discrimination against the people or against categories of people.** The differentiation discriminates against the people who travel on non passenger designed vehicles particularly Bakkies, persons who travel on these vehicles on the basis of non affordability and people who travel on these vehicles because they are located in rural areas and the road infrastructures do not support the usage of other vehicles except Bakkies and other big vehicles.

- c) **If the differentiation amounts to discrimination and if it is unconstitutional.** The differentiation is unconstitutional because in terms of Article 10 of the Constitution, no person should be discriminated against on the grounds of his/her socio economic status in society.

Applying the tests formulated in the cases above as well as the principles and arguments presented in the above cases, section 27(1) (a) differentiates between a certain class of our society and those are the people who live in rural areas and particularly those who can not afford to buy passenger seat-fitted vehicles. All these people in these communities have something in common and should not be differentiated on grounds of social status.

All road accident victims are equal and should be treated equally when it comes to benefiting in terms of the MVA Fund except in certain justifiable exceptions contained in section s 26 of the MVA Act 10 of 2007, on limitations and exclusions. Law is not static and should not only be in conformity with the Constitution but in conformity with the convictions of the society as well. The convictions of the society in the given situation is that, travelling in vehicles such as bakkies has been regarded as a norm and thus nothing is perceived to be wrong with this kind of transportation, thus since all the Namibians indirectly contributes towards the funds of the MVA Fund, they all deserve an equal chance of compensation.

CHAPTER 5

Conclusion and Recommendations

5.1 Conclusion

Our motor vehicle accident claims are based on third party compensation which is a well rooted division of law in our law in Namibia. The MVA Fund legislations contain various limitations and exclusions of the liability of the MVA Fund and not all the limitations and liabilities contained in these legislations are said to be society friendly and in conformity with the Constitution.

The words of section 27(1) (e) are not clear to the society which types or makes of vehicles are considered not suitable for the conveyance of passengers, it is also not clear whether these vehicles are the Bakkies, Vans e.t.c. For as long as there is no clear interpretation with regards to the makes of vehicles one would assume travelling on Bakkies and Vans rightful.

It is submitted that Section 27(1) (e) of the MVA Fund Act,¹²⁹ is discriminatory against a section of our society which is considered to be unable to afford passenger seat-fitted vehicles. By applying Article 10 of the Namibian Constitution it has then been concluded that, the section does not pass the constitutional test thus it differentiates on a certain class of people in our society.

Section 27(1) (e) further imposes rigid limitations on accident victims who were travelling on non properly seat fitted vehicles, if the MVA Fund continues with these rigid limitations it places on victims, it will only leave a question whether the Fund will one day leave up to its dreams and purpose which is to ensure that all road accident victims are compensated and cared for.

¹²⁹ Act No.10 of 2007.

In Conclusion it is therefore my submission that section 27(1) (e) differentiates between people who can afford to buy passenger seats fitted vehicles and those who can not afford to buy and maintain such vehicles. The section also further discriminates against the people who are living in societies where the road infrastructure do support all kinds of vehicles and those in society where the road infrastructure only supports some kind of vehicles. This differentiation is unfair and it calls for law reform.

It further appears that this section is discriminatory against people who can not afford to buy and or travel on (properly fitted seat vehicles), discriminatory on the basis of socio-economic status, and consequently it goes against Article 10 of the Namibian Constitution which guards against discrimination and which promotes equality of all before the law.

5.2 Recommendations

Having concluded that section 27(1) (e) is unfair and discriminatory, the following recommendations should be carried out to ensure that the discrimination introduced by this section is addressed.

Article 25 of the Namibian Constitution on the enforcement of the fundamental rights and freedoms provides that:

- (1) Save in so far as it may be authorized to do so by the Constitution , Parliament or any Legislative authority shall not make law , and the Executive and the agencies of Government shall not take action which abolishes or abridges the fundamental rights and freedoms conferred in chapter 3 of the constitution and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:
- (2) A competent Court instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or be, to correct any defect in the impugned law or action within a specified period, subject to such condition as may be specified by it. In such event and until such correction or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid.

This Article provides for a competent Court instead of declaring a law invalid it shall have the power and the discretion to allow parliament to correct any defect in the impugned law or action within a given period. It goes without saying that law is not static it can always be repealed to suit the conviction of the society.

Secondly, the fund may interview the section of the society which feels aggrieved and discriminated against by the section to suggest ways forward. Interviews will provide information to law makers on the above discussed section, whether the section calls for reform on bases of discrimination. The Fund can also relax the rule by prescribing the manner in which the passengers may be conveyed in passengers un-fitted vehicles.

Thirdly, since the section was enacted with the view of road safety in mind, the Fund should then ensure that all roads in rural and urban areas are safe to all road users in terms of infrastructures. For as long as the poor of our society are marginalised, benefits of the MVA Fund can not be limited in terms of sections such as section 27(1)(e) of the Act which are discriminatory.

Sections in the *MVA Fund Act* such as section 27(1)(e) where introduced for purposes of reducing the amount of money the MVA Fund spent on road accident victims. There are many other ways in which the amounts of money spent on road accident victims can be reduced. One of the ways is through the institution of legal action against drivers who causes road accidents negligently. This method in itself will also send out a message on road safety as drivers will drive cautiously in order to avoid causing accidents.

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Schedule A

Declaration

I, the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

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E.T.N.Ndipwashimwe

.....

Date

SUPERVISOR'S CERTIFICATE

I, Emilia Namwoonde, hereby certify that the research and writing of this dissertation was carried out under my supervision.

.....

Ms. E.Namwoonde

.....

Date

DEDICATION

In living memories of all those who passed away in motor vehicle accidents.

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First and foremost thanks goes to the almighty father God, who provided me with the power, strength and reasons to carry out this dissertation, without his guidance and assistance this paper would have not been possible. I further wish to thank the most generous family for their patience through my endeavours and to my parents for making it possible for me to undergo legal studies. I further wish to thank the University of Namibia for giving me space to learn and my lecturers for teaching me law and how to apply it.

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ABSTRACT

The Motor Vehicle Accident Fund is a statutory body established in terms of the Motor Vehicle Accident Fund Act 10 of 2007. The MVA Fund in terms of section 27(1) (e) is obliged to limit the benefit of the road accident victims who were travelling in a non-properly seat fitted vehicle, up to 50%.

Before the commencement of the MVA Fund Act 10 of 2007, the MVA Fund has compensated victims of road vehicle accidents who were travelling on un-properly seat fitted vehicles. With the advent of the MVA Fund Act 10 of 2007, this is not possible anymore.

For the past years the MVA Fund has been under the mandate to compensate all road accident victims and at present the MVA Fund has shifted from this mandate to include road safety, hence the introduction of Sec 27(1)(e) which aims at preventing passengers from travelling on un-properly seat fitted vehicles, with an aim to reduce accidents.

The application of Section 27(1) (e) disentitle victims who were travelling on un-properly seat fitted vehicles from receiving full compensation. The research question then arises out of the applicability of section 27(1) (e).

The Legal question which this research sets to answer is whether section 27(1) (e) of the MVA Fund Act contains strict limitations and whether the limitations contained in that provision have the potential of being unconstitutional. Due to the fact that there is no judicial pronouncement and academic comments neither the Namibian nor South African jurisprudence on the matter, great reference was made to the opinions of the MVA Counsels as well as the Namibian Constitution.

The research will focus mainly on the legal ramifications of section 27(1) (e) of the MVA Fund Act 10 of 2007, further consideration was paid to the provisions pertaining to liabilities of the Fund. The research was also be expanded by looking at section 23, 26 and the equality clause as contained in our Constitution.

By having looked and applied the provisions of Article 10 of the Constitution, it appears that section 27(1) (e) is discriminatory against people who can not afford to buy and or travel on properly seat fitted vehicles. It is further discriminatory on the basis of socio-economic status, and consequently it goes against Article 10 of the Namibian Constitution which guards against discrimination and which promotes equality of all before the law.

